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In The

Supreme Court of the United States

October Term, 1997

WESTINGHOUSE ELECTRIC CORPORATION,

Petitioner,

v.

JOHN M. RYDER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED

Question 1.

Whether a district court abuses its discretion under F.R.E. 403 by admitting evidence of allegedly ageist statements made by an employer's CEO and executives with hiring and firing authority to circumstantially show the corporate culture where employment decisions are made in an indirect evidence action under the Age Discrimination in Employment Act?

Question 2.

Where a party does not object to a trial judge's jury instructions, and where the jury instructions as a whole state the correct legal standard, must the trial judge *sua sponte* issue a curative instruction to correct a solitary erroneous utterance during the charge?

LIST OF PARTIES

Respondent concurs with Petitioner's List of the Parties.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, John M. Ryder, (hereafter "Ryder") respectfully requests this Court deny the petition for writ of certiorari, seeking review of the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case. That opinion is reported at 128 F.3d 128 (3d Cir. 1997).

JURISDICTION

Respondent agrees that Westinghouse's Petition for Writ of Certiorari was sought within 90 days of the judgment of the Court of Appeals and therefore is timely pursuant to 28 U.S.C. § 1257 and § 2101(c), and this Court's Rule 10(1)(c).

SUPPLEMENTAL STATUTES INVOLVED

In addition to the statutes cited by Petitioner, the following Rules are involved in the determination of the Petition:

Fed.R.Civ.P. 51.

Instructions to Jury: Objection

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly

the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

COUNTER STATEMENT OF THE CASE

A. Westinghouse Fires Ryder and Then Fabricates a Reason.

On April 6, 1993, Louis Facchini, controller of Westinghouse's power systems group in Pittsburgh, Pennsylvania, fired Ryder at age 52 after more than 30 years of service (R. 161);[1] (R. 192).[2] On the day he fired him, Facchini told Ryder: "I am eliminating your job, but, of course, I am not" (R. 192). That is exactly what occurred.

Shortly after Facchini "retired" Ryder and "eliminated" his job, he offered Ryder's position as Power Systems Group Controller Staff Assistant to Patricia Newingham, a 37-year-old who came under Facchini's supervision in February 1993, after her department was discontinued (R. 186-87). Ryder had trained Newingham to perform his job, and Newingham had been performing Ryder's job and continued to do so after Ryder was discharged (R. 405). Facchini protected Newingham from displacement when her department was discontinued by keeping her on a corporate payroll, although she worked solely for him (R. 363).

Indeed, in a document Westinghouse titled "Certificate of Non-Discrimination – Age," which Westinghouse used to document its decision to fire Ryder, Facchini identified Newingham as Ryder's replacement (R.

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[1] References to the record are noted as "(R. ___)."

[2] Facchini characterized his action as "retir[ing]" John Ryder (R. 383).

404-406). Facchini and his supervisor, Robert Faust, Vice President and Controller of Westinghouse, completed the "Certificate" on April 15, 1993, less than two weeks after Facchini told Ryder his position was being eliminated (R. 192); (R. 402); (R. 928-929).

Although Facchini believed Ryder was more qualified technically to perform the job than Newingham (R. 416), he replaced Ryder with Newingham because he was looking for someone more ambitious, flexible and hungry (R. 416).

Facchini characterized Ryder as a "blocker," (R. 484-485), someone who is preventing someone younger from getting through to another executive level (R. 482).

On the "Certificate of Non-Age Discrimination," Facchini and Faust admitted their action was not based in *any* degree upon Ryder's performance (R. 930); (R. 410). Indeed, on a March 1993 performance evaluation completed seven to ten days before Ryder was fired for what Faust and Facchini at trial claimed was poor performance, Facchini noted Ryder was "promotable" (R. 27-28); (R. 387-388).

However, when Ryder filed a charge of discrimination with the Equal Employment Opportunity Commission, and at trial, Westinghouse began to claim it did not "replace" Ryder with Newingham, *see* (R. 15) and that he was discharged because of "cost reduction and performance" (R. 928); *see also* (Petition at 2-3).

In its response to the Charge of Discrimination filed with the EEOC, Westinghouse claimed that when Ryder's job was eliminated a new and different training position arose (R. 350); (R. 15).

The only difference between the job description Westinghouse provided as being the "new training position"

and Ryder's position, however, was that Ryder's job description identified the job as being for the Power Systems Division, while the "new training position" Newingham obtained was listed as being in the Corporate Financial Planning Division (R. 329-330).

Facchini admitted at the beginning of 1993 he had two staff persons assisting him in his job: his secretary, and his staff assistant, Ryder (R. 358-359). Following his discharge of Ryder, Facchini still had two staff persons assisting him in his job: his secretary and Patricia Newingham (R. 360). He always had a staff assistant (R. 361).

According to Facchini, the decision to create a new training position occurred in April 1993 (R. 365). Facchini said he then considered several employees for the new position, talked with Newingham about the position and told her it was a temporary training job (R. 474). According to Westinghouse's letter to the EEOC, Newingham started in the "new" position effective June 1, 1993 (R. 15).

Newingham, however, apparently was oblivious to this series of events. She testified she began working for Facchini in January or February 1993 (R. 497), shortly after the group for which she worked was eliminated, and the divisions reporting to it were transferred to Facchini's group (R. 498):

> Q. You don't ever recall sitting down and having a meeting with Mr. Facchini where he told you, I've created a new job, a new training position, and I am giving you that job, do you?
>
> A. No.

(R. 510). *Compare* (R. 474).

Facchini testified he considered only three persons to fill this "new" training position: Newingham, then age 37

(R. 398); Jim Kohosek, then age 34 (R. 401); and Mike Friday, then age 35 (R. 401). All three of those people were still with Westinghouse as of trial (R. 475).

While six days after Ryder was "retired," Facchini and Faust insisted performance played no role in his demise, (R. 409); (R. 930), once trial began "performance was the main thing," according to Facchini (R. 825).

These difficulties, according to Westinghouse, ran the gamut from poor interpersonal skills, to an alcohol problem. Most of these performance concerns were not documented, and not relayed to Ryder when he was "retired," a fact Westinghouse now claims stemmed from its desire not to harm Ryder. *See* (R. 332-333). None of them were raised when the EEOC requested the reason Ryder was discharged. *See* (R. 14-17).

B. Westinghouse's CEO Publishes A Summary Of Various Age-Related Comments From General Managers Who Made Hiring And Firing Decisions.

Shortly before Ryder was "retired" on August 31, 1993, a new Chief Executive Officer and Chairman of the Board, Michael Jordan, arrived at Westinghouse (R. 420); (R. 637). At the time Ryder was told he was being terminated, Gary Clark was President and Acting CEO (R. 633-35). Clark had been president of Westinghouse prior to 1993 (R. 472).

During the summer of 1994, Clark and Jordan conducted a series of meetings with Westinghouse management at the general manager level (R. 426). Among the persons who attended some of these meetings, called Chairman's Initiative Sessions, were *Facchini*, Ryder's

direct supervisor (R. 423); and *Faust*, Facchini's supervisor (R. 452-453). The people who attended these Chairman Initiative sessions were general managers who made hiring and firing decisions and who set policy regarding hiring and firing practices in their own departments (R. 426-427). At trial Westinghouse claimed it destroyed files listing the actual names of the persons who attended (R. 451).

Following the five sessions, Jordan sent to all attendees a document he represented to be summaries of discussions that took place (A-19).[3] The summaries were a synopsis, not a verbatim transcript of the discussions (R. 648). In his Memo, Jordan said the accompanying summaries while long, were valuable (A-19), and that the discussions outlined provided some good ideas. *Id.*

The summary Jordan sent to managers with his endorsement of its contents suggested that the age of the workforce was of some importance to Westinghouse:

> We think we need to get *younger individuals* who think well and who think differently involved in the process as well . . .

(A-15) (emphasis added).

In the excerpts Jordan chose to publish of another session devoted to employee selection, Jordan, Clark and the other managers discuss the concerns with Westinghouse's older workforce:

> In many of our businesses, we have an *older workforce*. As a result, that workforce gets a higher salary. Additionally our low growth businesses can *strain opportunities for younger workers*. Somehow, we must provide those

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[3] References to the Appendix to Westinghouse's Petition For Writ of Certiorari are designated as (A-___).

opportunities. We have to get the "blockers" out of the way.

(A-34).

Westinghouse has been pretty paternalistic in the past, and we've ended up with too much dead wood in the organization.

(A-37).

Yes, and that's a big issue because as you squeeze the infrastructure, you want your best talent to stay in the organization.

(A-37).

We really haven't hired much over the last 10-15 years. As a result, we have a hole in terms of people development. *We don't have enough people in the organization ages 30-40 . . .*

(A-38).

Blockers are always an issue but they're less of an issue when you are in a growth mode. Removing blockers is very important when you're in a downsizing mode because you don't have the kinds of opportunities that growth provides you.

(A-38).

People down in the organization know who they are . . . [W]e have to put ourselves in a position of getting high pots into more responsible jobs and move the blockers aside. That's hard to do, and no one likes to do it, but we're paying the price now for our inability to do it in the past.

(A-38-39).

. . . [A]n eager high-energy person will get more done in one month than someone who has retired in place will do in one year.

(A-39).

> We seem to be missing the people in the middle of the age range who have talent, the willingness and the horsepower to take on risky change projects . . .

(A-41).

> Regarding the issue of blockages in the organization that's something you need to work on in the business units . . . We are going to push to change the old rules and the old paradigms. This was a good session with a lot of good ideas and I hope you feel the same way.

(A-42).

Facchini saw Ryder as a "blocker," (R. 484-485), a term he agreed was someone who is preventing someone younger from getting through to another executive level (R. 482).

Clark, Westinghouse's president when Ryder was "retired," believes some of the statements made in the Jordan Memo evidence discrimination (R. 672-674).

C. Westinghouse Never Objected to The Claimed Jury Charge Error it Raises Here.

Prior to trial, Westinghouse submitted proposed jury instructions requesting the jury be charged on the standard under *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), in relevant part as follows:

> If you determine that the Plaintiff has made out a *prima facie* case and if you determine that Westinghouse has articulated or explained – not proven – a legitimate reason for eliminating Plaintiff's job, then you may consider if the Plaintiff has proven to you by a preponderance of the evidence that the legitimate non-discriminatory reasons stated to you by Westinghouse were simply a pretext for discrimination

> against Plaintiff on the basis of age. That is, you may then consider whether Plaintiff has proven by a preponderance of the evidence . . . that the explanation offered by Westinghouse for the treatment of Plaintiff was not the real reason behind its treatment of him.
>
> If you find that Plaintiff has established . . . that Westinghouse merely used the elimination of Plaintiff's job as an excuse for discriminating against the Plaintiff on the basis of his age, then you *must find in favor* of Plaintiff.

(R. 84) (emphasis supplied).

The district court charged on this issue as follows:

> You may infer that Mr. Ryder has met his burden of proof if you find the four facts set forth above have been proven by a preponderance of evidence, and – and note that I say "and" – if you further disbelieve defendant's explanation for why plaintiff's employment was terminated.
>
> . . . If you find that Westinghouse articulated legitimate nondiscriminatory reasons for eliminating plaintiff's job, then you must determine whether plaintiff has proven . . . that the reason or explanation given by the defendant was not the real or true reason behind Westinghouse's action in terminating Ryder's employment.
>
> *In this area of the law, an explanation offered by an employer for its treatment of an employee that is not its real reason for such treatment is referred to as a pretext for illegal discrimination.* If you find that Mr. Ryder has proven by a preponderance of the evidence that the defendant used the elimination of plaintiff's job as an excuse or pretext *for discriminating against him* on the basis of his age, *then* your verdict will be for the plaintiff.
>
> On the other hand, if you find that the explanation offered by Westinghouse that it eliminated

> Ryder's job to establish a rotational training position and because of his performance were legitimate reasons for plaintiff's termination, and that plaintiff has not proven . . . *that age was a determining factor* in the termination, then your verdict will be for the defendant.
>
> In making this determination, you should be aware of the following: The *burden of proving discrimination always* remains with the plaintiff, to *prove* he was the victim of age discrimination . . . Your job is to determine whether Westinghouse discriminated against Ryder on the basis of his age.

(R. 1234-1236) (emphasis supplied).

The trial judge provided written copies of her proposed charge to counsel for both parties prior to charging the jury. Westinghouse objected to the district court's proposed charge only because it contended the charge permitted the jury to find discrimination based solely on a finding of a *prima facie* case. (R. 1219).[4]

Though it did not object to the district court's use of the phrase "in this area of the law, an explanation offered by an employer for its treatment of an employee that is not its real reason for such treatment is referred to as a pretext for illegal discrimination" either prior to or following the district court's charge, *see* (R. 1243-44), or in its Rule 59 motion or brief, *see* (R. 105), Westinghouse, for the first time before the Court of Appeals, took issue with

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[4] Westinghouse's counsel cited *Seman v. Coplay Cement Co.*, 26 F.3d 428, 436-38 (3d Cir. 1994), to argue the district court's charge should not mention the *prima facie* case because once the defendant met its burden of production, the presumption of the *prima facie* case disappeared. *See* (R. 1220-1221).

that language and claims the district court's phrase misstated the law.[5]

Following a two week trial, the jury found Westinghouse had discriminated against Ryder because of his age and awarded $241,909.00.

D. The Third Circuit Ruling.

1. The Memo

The U.S. Court of Appeals for the Third Circuit held that the district court did not abuse its discretion in admitting the Jordan Memo over Westinghouse's objection under Fed.R.Evid. 403. *Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 132-33 (3d Cir. 1997). The court recognized a plaintiff may offer circumstantial proof of intentional discrimination on the basis of age in the form of a supervisor's statement relating to formal or informal managerial attitudes held by corporate executives. The court noted that the importance of such comments seem to become ever more critical as sophisticated discriminators render their actions increasingly more subtle to circumvent adverse judicial predecent. *Id.*

The court eschewed a bright line rule of when such ageist statements would be admissible, instead instructing the district courts to evaluate factors pertaining to the declarant's involvement in recognizing a formal or informal managerial attitude, including the declarant's position in the corporate hierarchy, the purpose and content of the statement, and the temporal connection between

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[5] Remarkably Westinghouse attempts to hide its failure to object to the district court's charge by burying that admission in a footnote in the statement of the case. *See* (Petition for Writ of Certiorari at 8, n.6.), and never mentioning it again.

the statement and the challenged employment action. *Id.* at 133.

Although the comments were not directly related to the challenged employment action, they were made by either the company CEO or by executives with authority to render personnel decisions. Moreover, the comments were made in reflection on past managerial viewpoints at Westinghouse with an eye toward future change. If the jury were to believe that these comments accurately reflected a then-existing managerial attitude toward older workers in April 1993, this evidence would have made the existence of an improper motive for Ryder's termination more probable. *Id.* at 133.

2. The Jury Instruction.

The Court of Appeals held that Westinghouse failed to object to the challenged jury instruction as required by Fed.R.Civ.P. 51. It therefore reviewed the jury instruction for plain error. *Id.* at 136. The court noted that while the isolated statement by the district court that in this area of the law an explanation offered by an employer for its treatment of an employee that is not its real reason for such treatment is referred to as a pretext for illegal discrimination, was in error, it was offset by the court's repeated correct explanation of Ryder's burden of proof. *Id.* at 137.

Reviewing the jury instructions as a whole, and on a plain error standard, the court found the multiplicity of correct statements of law negated the effect of the district court's solitary erroneous utterance, and therefore the jury instructions were not plainly erroneous. *Id.*

The Third Circuit did not consider the district court's failure to give a curative instruction because Westinghouse never asked for one, not before the jury was charged, not after the jury was charged, and not even in its Motion for a New Trial. *Id.* at 135 & n.9.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

NO ACTUAL CONFLICT EXISTS ON THE ADMISSIBILITY UNDER RULE 403 OF "STRAY REMARKS" EVIDENCE IN AN ADEA PRETEXT CASE.

As this Court has recognized, the question facing triers of fact in discrimination cases – the state of a corporate entity's mind – is both sensitive and difficult. *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). There seldom will be "eyewitness" testimony as to the employer's mental process. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 524 (1993).

In meeting the difficult burden of persuading the fact-finder to disbelieve an employer's account of its own motives, an employee is not limited to presenting evidence of a certain type. Such evidence may take a variety of forms. *Patterson v. McLean Credit Union*, 491 U.S. 164, 187 (1989). For example, evidence that the reasons put forward by the employer are pretextual may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. *Hicks*, 509 U.S. at 511. A plaintiff can prove the defendant's state of mind through circumstantial evidence such as evidence of past conduct or prior incidents. *Aikens*, 460 U.S. at 714 n.3. Other evidence that may be relevant to a showing of discrimination includes the employer's general policy and practice with respect to minority employment. *McDonnell Douglas*

Corp. v. Green, 411 U.S. 792, 804-05 (1973); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978).

To show the employer's general policy and practice this Court has recognized, albeit in dicta, that remarks by non-decisionmakers, and by decisionmakers unrelated to the decisional process itself, while not sufficient to trigger a shift of the burden of proof to the employer under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), can certainly be *evidence* that an illegal motive played a part in the employer's decision, *id.*, 490 U.S. at 251 (plurality) or may be probative, *id.*, 490 U.S. at 277 (O'Connor, J. concurring).

The Courts of Appeals do not disagree. In an indirect evidence or pretext case, discriminatory remarks, although unrelated to the employment decision at issue, are probative of pretext and may be used to support a *prima facie* case for a plaintiff using the *McDonnell Douglas/Burdine/Hicks* method of proof. While such remarks do not themselves suffice to either shift the burden of persuasion onto the employer as in a *Price Waterhouse* case, or even to themselves carry the day for the employee in a *McDonnell Douglas* "pretext" case, they do provide some evidence that when coupled with other evidence can support a verdict.

For example, the Seventh Circuit, like the Third Circuit in this case, recognizes that while so-called "stray remarks" are not probative of an employer's intent in a direct proof case, such evidence is probative of discriminatory bias when assessing whether an employer's reasons for an adverse employment action are pretexts for illegal discrimination. *Huff v. UARCO Inc.*, 122 F.3d 374, 385 (7th Cir. 1997).

Likewise, the First Circuit holds that evidence of a corporate state of mind or a discriminatory atmosphere is

not rendered irrelevant by its failure to coincide precisely with the particular actors or timeframe involved in the specific events that generated a claim of discriminatory treatment. *Conway v. Electro Switch Corp.*, 825 F.2d 593, 597 (1st Cir. 1987); *Cf. Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 96 (1st Cir. 1996) (stray remarks probative of discrimination although not direct evidence). The Sixth Circuit held in *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1331 (6th Cir. 1994), that statements made by the employer's president more than two decades earlier were probative because the president was the "ultimate decisionmaker" at the employer and evidence that he had a bias goes to the employer's state of mind – a highly probative fact in a discrimination case.

The Second Circuit holds that while discriminatory statements made by nondecisionmakers alone do not prove a discriminatory discharge they may suffice to present a *prima facie* case and may indeed persuade the fact finder that the plaintiff had carried her ultimate burden of persuasion. *Ostrowski v. Atlantic Mutual Ins. Co.*, 968 F.2d 171, 182 (2d Cir. 1992). Likewise, the Third Circuit similarly holds that although temporally remote discriminatory statements standing alone do not suffice, they support a finding of discrimination when combined with other evidence. *Ezold v. Wold, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 545 (3d Cir. 1993), citing *Roebuck v. Drexel University*, 852 F.2d 715, 733 (3d Cir. 1988); *Antol v. Perry*, 82 F.3d 1291, 1302 (3d Cir. 1996).

The decisions Petitioner cites to support its claim that a conflict exists are readily distinguishable. They involve an analysis of whether the stray remarks at issue are sufficient *in themselves* to either show a *prima facie* case, or to preclude summary judgment. They do not involve

analysis of the probative value of such evidence under Fed.R.Evid. 403 in an ADEA pretext case.

Thus, in *O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542, 549 (4th Cir. 1995), *rev'd on other grounds*, 517 U.S. 878 (1996), the Fourth Circuit held that the remarks at issue were not *direct evidence*. Because the court had held that the plaintiff in that case did not meet a *prima facie* case, the only way he could proceed was through "direct evidence." *Id.*, 56 F.3d at 548. Likewise, *Wilde v. Florida Pneumatic Mft. Corp.*, 941 F. Supp. 1203 (S.D. Fla. 1996), the district court decision Petitioner claims to represent a trial court in search of a proper analytic standard (Petition at 12) involved a claim that stray remarks support a *prima facie* case and therefore preclude summary judgment when no other evidence of discrimination exists. *Id.* at 1206. *Wilde* searched for decisions in which stray remarks were held to support a *prima facie* case of age discrimination.

In short, no conflict exists among the circuits on the issue in this case, and even if one does exist, that is how it should be. The question of the probative value of stray comments does not lend itself to a black letter rule. The value is determined on a case-by-case basis by reviewing the factors the Third Circuit reviewed in this case.

Because the probative value of stray remarks in a discrimination case is inherently fact and situational bound, no real or intolerable conflict exists among the circuits in this case and Westinghouse's Petition for Writ of Certiorari should be denied.

A. Rule 401 and 403 rulings by trial courts in employment discrimination cases are inherently fact bound and ill suited for broad pronouncements by this Court concerning the probative value of specific evidence.

This Court repeatedly and recently has held that abuse of discretion is the proper standard of review of a district court's evidentiary rulings. *General Elec. Co. et al. v. Joiner*, ___ U.S. ___, 1997 U.S. LEXIS 7503 (December 15, 1997); *Old Chief v. United States*, 519 U.S. ___, ___ n.1, 117 S.Ct. 644, 647 n.1 (1997).

A court of appeals applying "abuse of discretion" review may not categorically distinguish between rulings allowing such testimony and rulings disallowing it, as Petitioner here attempts to do. *See Joiner*, 1997 U.S. LEXIS 7503 at *12.

If judicial self-restraint ever is desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal. *United States v. Long*, 574 F.2d 761, 767 (3d Cir. 1978), *cert. denied*, 439 U.S. 985 (1978). As the Seventh Circuit has aptly held:

> The balancing of probative value and prejudicial effect, like other comparisons of intangibles, requires an exercise of judgment rather than a computation. Only in an extreme case are appellate judges competent to second-guess the judgment of the person on the spot, the trial judge.

Sims v. Mulcahy, 902 F.2d 524, 531 (7th Cir. 1990).

Properly analyzing that standard is exactly why this case is not "cert-worthy." The district judge here was trying an age discrimination case. She was confronted with a record in which the decisionmaker testified he moved Ryder aside to put in a younger up-coming star, and the Jordan Memo evidence was offered to show the

high level management atmosphere in which the company made its employment decisions. The judge admitted the testimony in the middle of the trial after hearing evidence from several witnesses. As the Sixth Circuit has held in a similar factual situation, evidentiary rulings such as this do not have one black letter law, right-or-wrong answer. Rather, they demand swift, but judicious weighing and balancing. *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1332 (6th Cir. 1994).

Indeed, because such questions are subject to a judge's discretion the courts would affirm such evidentiary decisions "either way," whether the response to the lawyer's objection had been sustained or overruled. In short, either ruling could be right, because it is so fact based and involves a view of trial that cannot be obtained from a cold appellate record. Thus, this case is a bad vehicle for this Court to exercise its supervisory role. A reversal based upon appellate disagreement with the trial judge's balancing under Rule 403 necessarily must be founded upon highly subjective reasons, which, experience teaches, are not always readily recognizable or definable. *Long*, 574 F.2d at 767.

Rule 403 itself does not establish a mere imbalance standard between the probative value and the danger of unfair prejudice, but rather provides that evidence "may" be barred, only if its probative value is substantially outweighed by unfair prejudice. Where in that equation is a broad rule that "all stray remarks lack probative value regardless of the factual circumstances?" Leaving the Rule 403 balance to the trial judge, as this Court repeatedly has done, is the best way to resolve the problem of numerous appeals to the circuit courts that Petitioner now purports to champion.

B. Eliminating discrimination, a matter to which Congress has attached some public importance, would not be furthered by blanket legal and logical evidentiary pronouncements.

In this case, Westinghouse's CEO, its President, and its top management team sat in meetings and bemoaned the fact that the company did not have enough younger people; suggested that older workers were blockers who were standing in the way of those younger people; and then noted they had to get the blockers out of the way. The CEO sat by and participated in those conversations, and then circulated a summary of the comments with his endorsement.

Rather than a "vacuous invocation" of the phrase "relevant to corporate attitudes or culture," as Petitioner contends, the evidence in the Jordan Memo goes to the heart of what this Court has recognized is relevant evidence of discrimination – evidence of an employer's policy and practice regarding the protected group at issue. *McDonnell Douglas*, 411 U.S. at 804-05. Such evidence is important in a situation where, as here, plaintiffs are faced with the unenviable task of proving the mind-set of an employer who is unlikely to cooperate. Courts long have recognized that proving intentional discrimination is a difficult task and that plaintiffs must be given wide latitude in marshalling evidence that, by logical inference, supports a finding of discrimination. *Patterson*, 491 U.S. at 187-88.

As Judge Posner has noted: "Defendants of even minimal sophistication will neither admit discriminatory animus, nor leave a paper trail demonstrating it . . . [a]

plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries." *Riordan v. Kempiners*, 831 F.2d 690, 697-98 (7th Cir. 1987). *See also Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3d Cir. 1996) (anti-discrimination laws and lawsuits have educated would-be violators . . . violators have learned not to leave the proverbial "smoking gun" behind); *McNeil v. Economics Laboratory, Inc.*, 800 F.2d 111, 116-17 (7th Cir. 1986) (stressing that nexus between evidence of discriminatory bias and the decision must typically be inferred, since it is "unusual to find direct evidence of intent").

The lack of direct evidence of discrimination in all but the most rare case is important to determining the probative value of corporate attitudes. As this Court just recently held, the probative worth of any particular bit of evidence is obviously affected by the scarcity or abundance of other evidence on the same point. *Old Chief v. United States*, 117 S.Ct. at 652.

Thus, a price would be paid for the blanket evidentiary pronouncements Petitioner champions, but it would not be paid by companies whose CEO, President and top managers engage in discussions about how to eliminate older workers blocking the way for younger ones. The price for narrowing circumstantial evidence of discrimination in this era when anti-discrimination lawsuits have educated would-be violators to be careful, will be paid by the victims of those sophisticated discriminators.

C. The district court and the Third Circuit correctly admitted the Jordan Memo in this case based on the record.

Here, both the district court and the Third Circuit properly analyzed the probative value of the Jordan Memo. Coupled with Petitioner's generalized and speculative view of the unfair prejudice that admission of the Memo would visit on it, the Court of Appeals found no abuse of discretion in the district court's admission of the memo.

The Jordan Memo was introduced to show the corporate culture in which employment decisions were made – evidence the courts have repeatedly recognized to be admissible as circumstantial evidence of discrimination. *See Antol*, 82 F.3d at 1302; *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 334 (3d Cir. 1995).

Evidence is relevant if it has "any tendency to make the existence or non-existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." Fed.R.Evid. 401. In an age discrimination case, a plaintiff must prove as one element of his case that the defendant intentionally discriminated against him because of his age. To prove the discrimination was intentional, Ryder must show Westinghouse's state of mind. *Burdine*, 450 U.S. at 255; *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

Circumstantial proof of discrimination typically includes unflattering testimony about the employer's history and work practices – evidence that in other kinds of cases may well unfairly prejudice the jury against the defendant. In discrimination cases, however, such background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to

have acted from an unlawful motive. *Glass v. Philadelphia Elec. Co.*, 34 F.3d 188, 195 (3d Cir. 1994), *citing Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988).

A plaintiff can prove the defendant's state of mind through circumstantial evidence such as evidence of past conduct or prior incidents, *Aikens*, 460 U.S. at 714 n.3, 715; or evidence of subsequent statements or conduct. *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995); *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 54 (3d Cir. 1989) (finding age-based comments relevant even when made subsequent to plaintiff's termination).

As the Third Circuit held, not just any ageist statements made by any corporate executive are relevant as evidence of corporate culture, which would circumstantially prove a discriminatory animus. Rather, the court must evaluate factors pertaining to the declarant's involvement in recognizing a formal or informal management attitude, including the declarant's position in the corporate hierarchy, the purpose and content of the statement, and the temporal connection between the statement and the challenged employment action. *Ryder*, 128 F.3d at 133.[6]

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[6] If this Court finds it desirable to speak on the issue of so-called "stray remarks" evidence in a pretext case, there are much better examples than this case. The statements in the Jordan Memo were not inadverant comments that may have had some age taint to them, such as, for example, the statement in *Waldron v. SL Industries, Inc.*, 56 F.3d 491, 502 (3d Cir. 1995), where a comment was made five months before termination that the employee should lose weight because it would make him look younger.

The court found the Jordan Memo was probative because the comments were made by either the CEO or executives with authority to render personnel decisions and were made in reflection on past managerial viewpoints at Westinghouse with an eye toward future change. *Id.* If the jury were to believe these comments accurately reflected a then-existing managerial attitude toward older workers in April 1993 this evidence would make the existence of an improper motive for Ryder's discharge more probable. *Id.*

Rather than punishing Westinghouse because its managers are "bad," or "politically incorrect" as Petitioner suggests, the discussions in the Jordan Memo go to the heart of Ryder's contentions in this case.

Ryder contended, and the record supports, that he was fired to make way for a younger employee who Westinghouse contended was more "flexible"; in short, that he was a "blocker." That view of younger employees vis-a-vis older ones is precisely the view permeating the Jordan Memo. From managers' statements that the company needed to move aside members of the older workforce to provide opportunities for younger employees, *see* (A-34), to Jordan's observation that the company "seems to be missing the people in the middle of the age range who have talent, the willingness and the horsepower to take on risky change projects," *see* (A-41), the Jordan Memo shows management's view that the older worker will be sacrificed in favor of the younger one, based on stigmatizing stereotypes. *See Hazen Paper*, 507 U.S. at 610-11. Because the Jordan Memo discusses overt age-related preference and uses code-word pejoratives for age as well, a fact finder could certainly believe lower managers would share similar viewpoints. "When a major

company executive speaks, 'everybody listens' in the corporate hierarchy." *Lockhart*, 879 F.2d at 54.

Evidence of that culture is relevant in assessing Westinghouse's intent. The fact that manifestations of that culture showed up in memo form after Ryder was fired does not diminish its relevance. People and companies tend to act consistently. A jury could reasonably find that a high level manager who agreed in 1994 that the company had too many older workers and needed more 30-40 year olds, held that same opinion in 1993. It is reasonable to assume this animus did not develop suddenly, and that it in fact existed at Westinghouse ten months earlier. *See Brown v. Boston University*, 891 F.2d 337, 350 (1st Cir. 1989) (fact that remarks occurred subsequent, rather than prior to discharge does not alter their admissibility. Jury entitled to infer any discriminatory animus toward women manifested in 1982 and 1983 would have existed in 1980 and 1981).

While Congress certainly did not enact laws making political incorrectness or discriminatory comments by managers illegal, circumstantial evidence of a discriminatory atmosphere at a plaintiff's place of employment is relevant to the question of motive in considering a discrimination claim. Such evidence may not be conclusive proof of discrimination against an individual, and, Petitioner's aspersions aside, neither Ryder, the district court, nor the Court of Appeals claim that to be the case. However such evidence tends to add color to the employer's decisionmaking process and to the influences behind the actions taken with respect to the individual plaintiff. *Conway*, 825 F.2d at 597; *West v. Philadelphia Elect. Corp.*, 45 F.3d 744, 757 (3d Cir. 1995).

For all of the above reasons, this case is simply an example of a district court engaging in a Rule 403 balancing, and then the court of appeals using the proper standard to hold that the trial judge did not act arbitrarily and irrationally in her finding that any unfair prejudice did not outweigh the relevancy of the comments. This is especially true because the case centered on a claim involving the state of mind of a fictional entity. Therefore, this case does not present a "cert-worthy" legal issue and Westinghouse's Petition for Certiorari should be denied.

II.

PETITIONER DID NOT EVEN OBJECT TO THE JURY INSTRUCTION IT CLAIMS WAS ERROR.

Petitioner's second proposed reason for granting a writ of certiorari is easily resolved. Westinghouse claims a solitary isolated erroneous remark in the jury instruction required a remand, and that the Courts of Appeals conflict on this issue.

However, even if it is correct (and as set forth below, no conflict actually exists), Petitioner has waived this issue because it failed to object to the language in the jury charge it now attacks. Remarkably, Petitioner attempts to hide this basic problem by alluding to it only in an obscure footnote in its statement of the case, and then ignores the waiver in its argument.

In *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 258-259 (1987), this Court held that a failure to object before the district court to a jury instruction precludes review except in rare circumstances. That rule has special force because Fed.R.Civ.P. 51 provides that [n]o party may assign as error the giving . . . [of] an instruction

unless [it] objects thereto before the jury retires to consider its verdict." *Id.* at 259. Rule 51 could not be expressed more clearly, and it serves an important function in ensuring orderly judicial administration and fairness to the parties. The trial judge is informed in precise terms of any objections to proposed instructions and thus is given "an opportunity upon second thought, and before it is too late, to correct any inadvertent or erroneous failure to charge." *Marshall v. Nugent*, 222 F.2d 604, 615 (1st Cir. 1955). Moreover, the rule prevents litigants from making the tactical decision not to object to instructions at trial in order to preserve a ground for appeal.[7]

Here, Petitioner failed to object to the portion of the charge during the charge conference; failed to object when the district judge provided the parties with written copies of her proposed charge; failed to object during argument concerning other language in the written charge, and failed to object immediately after the jury was charged, although the district judge provided the parties with another opportunity to do so. Moreover, Petitioner did not object to the language it now finds so

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[7] In *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815 (1985), this Court did review a jury instruction that was not preserved by an objection before the district court. However, in that case, the Respondent first referred to the requirements of Rule 51 in one sentence in her brief on the merits in this Court, at which time she did not even suggest the question had not been preserved. This Court reviewed the question because it was not brought to the Court's attention in the respondent's brief in opposition to the petition for certiorari, and indeed not even raised in the court of appeals. Therefore the Court deemed the waiver issue to have been waived by respondent. *Id.* at 816. Here, of course, Ryder raised the issue in the Third Circuit, *Ryder*, 128 F.3d at 135, and again raises it here.

prejudicial in its post trial motion for a new trial under Fed.R.Civ.P. 50, although it claimed other portions of the charge were erroneous.

The first time Petitioner raised the language it now claims to have misled the jury was with the Court of Appeals. The Third Circuit reviewed the record and found Westinghouse had never objected. *Ryder*, 128 F.3d at 135 & n.9. Petitioner does not here claim the Court of Appeals erred in that finding. The court reviewed the jury instruction as a whole for plain error, and affirmed the verdict finding the multiplicity of correct statements of law negates the effect of a solitary erroneous utterance. *Id.* at 137. The Third Circuit's analysis of why the jury instruction read as a whole was not plain error was correct.[8]

Therefore, even if the jury charge read as a whole was error, which it was not, this Court's commitment of judicial resources to review an ADEA jury instruction would be better left to a case where the objections to those instructions have not been waived. The court repeatedly instructed the jury on the correct burden as set forth in *McDonnell Douglas*, *Burdine*, and *Hicks*. If the Court desires to refine that burden it should wait for a

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[8] Indeed, Petitioner received a more thorough review than a party who fails to object to a jury charge usually receives. *See, e.g., Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1306 (3d Cir. 1997) where the court declined to review an asserted error in a jury charge in a hostile environment sexual harassment claim that precluded the jury from considering evidence of quid pro quo sexual harassment or of retaliation because plaintiff failed to specifically object to the charge, and never gave the district court any reason to believe she was making the argument raised on appeal. In short Westinghouse received more from the court of appeals than it even should have.

case where the Petitioner at least gave the district court a chance to address the alleged error.

A. No Conflict Exists Among the Circuits Over Review Of A Waived Jury Charge Issue.

Each of the cases Petitioner cites, therefore, are factually distinct because the party claiming error at least did so before the district court, or the issue of waiver was not involved.

In *Moreau v. Pennsylvania R.R. Co.*, 166 F.2d 543, 544 (3d Cir. 1948) (Petition at 17 n.7), counsel objected to the part of the charge raised on appeal. In *Sessoms v. Union Sav. & Trust Co.*, 338 F.2d 752, 759 (6th Cir. 1964) (Petition at 17 n.7), no waiver was involved. In *Thornley v. Penton Publishing, Inc.*, 104 F.3d 26, 30 (2d Cir. 1997) (Petition at 18), the appellant argued its position on the jury instruction to the district judge, who rejected it. In *Blossom v. CSX Transp., Inc.*, 13 F.3d 1477 (11th Cir. 1994) (Petition at 18), no indication exists in the court's opinion that the plaintiff failed to object. In *Jamesbury Corp. v. Litton Indus. Products, Inc.*, 756 F.2d 1556, 1557 (Fed. Cir. 1985) (Petition at 18), Jamesbury had timely objected to the jury charge on the issue involved. In *Smalley v. Duluth, Winnipeg & Pacific Ry. Co.*, 940 F.2d 296 (8th Cir. 1991) and *Spartaburg County Sch. Dist. v. Nat'l Gypsum Co.*, 805 F.2d 1148 (4th Cir. 1986) (Petition at 18), the courts did not apply a clear error review. In *Houston v. Herring*, 562 F.2d 347, 348 n.1 (5th Cir. 1977) (Petition at 18), appropriate objection was made to the pertinent parts of the instructions. In *Seltzer v. Chesley*, 512 F.2d 1030, 1032, & n.1 (9th Cir. 1975) (Petition at 19), counsel objected to the instruction, and to the proposed curative instruction. Indeed, the court of appeals emphasized what Petitioner seems to forget here:

the purpose of Rule 51 is to give trial judges an opportunity to correct their instructions. *Id.* at 1035.[9]

Not one time during the proceedings before the district court in this case did Petitioner ever mention that it thought the language used was incorrect. It had ample opportunity to do so. The district judge gave both parties wide latitude to raise any problems with the printed charge both before and after it was given. The trial judge

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[9] No conflict exists on the effect of a party's failure to object to a jury charge. *See Graham v. Davis*, 880 F.2d 1414, 1419-20 (D.C. Cir. 1989) (failure to specifically object to jury charge does not preserve error for appellate review); *Elgabri v. Lekas*, 964 F.2d 1255, 1258 (1st Cir. 1992) (failure to object reviewed only for plain error, a doctrine applied sparingly and only in exceptional cases or under peculiar circumstances to prevent clear miscarriage of justice); *Travelers Indemnity Co. v. Scor Reinsurance Co.*, 62 F.3d 74, 79 (2d Cir. 1995) (jury instructions reviewed for fundamental error where failure to object); *Hafner v. Brown*, 983 F.2d 570, 578 (4th Cir. 1992) (failure to object precludes consideration of asserted error on the merits); *Kelly v. Boeing Petroleum Services, Inc.*, 61 F.3d 350, 361 & n.30 (5th Cir. 1995) (plain error review because failure to object); *Preferred RX, Inc. v. American Prescription Plan, Inc.*, 46 F.3d 535, 548 (6th Cir. 1995); *Haley v. Gross*, 86 F.3d 630, 644 (7th Cir. 1996) (failure to challenge jury instruction in a civil case constitutes waiver of that challenge and precludes appellate review); *Dupre v. Fru-Con Engineering, Inc.*, 112 F.3d 329, 333 (8th Cir. 1997) (failure to object waives right on appeal to object to a jury instruction on those grounds); *Glover v. Bic Corp.*, 987 F.2d 1410, 1418 (9th Cir. 1993) (absent proper objection to jury instruction, even plain error appellate review is not available); *Campbell v. Barlett*, 975 F.2d 1569, 1576 & n.11 (10th Cir. 1992) (absent objection only appellate review for fundamental error proper); *Wammock v. Celotex Corp.*, 835 F.2d 818, 822 (11th Cir. 1988) (absent objection, no appellate review of jury instruction); *Modine Mfg. Co. v. Allen Group, Inc.*, 917 F.2d 538, 542 (Fed. Cir. 1990) (failure to object to jury instruction precludes challenge on appeal).

made changes suggested by Petitioner on other issues. If the district court never informed the jury it defined "pretext" incorrectly, as Petitioner claims, Petitioner has only itself to blame, because it did not even bring that claim to the district court's attention at trial or in its brief in support of its Motion for a New Trial under Rule 50.

Thus, even if a "markedly different" analysis exists on the issue of dealing with a jury instruction containing a solitary erroneous utterance coupled with a multiplicity of correct statements, this is not the case to resolve that conflict because Petitioner's waiver makes this case different.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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